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No. 06-1322

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In the Supreme Court of the United States

FEDERAL EXPRESS CORPORATION, PETITIONER

v.

PAUL HOLOWECKI, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

The Age Discrimination in Employment Act of 1967 (ADEA), provides that "[n]o civil action may be commenced by an individual * * * until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission." 29 U.S.C. 626(d). The question presented is what constitutes "a charge alleging unlawful discrimination" under the ADEA.

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INTEREST OF THE UNITED STATES

The question presented in this case is what constitutes "a charge alleging unlawful discrimination" under the Age Discrimination in Employment Act of 1967 (ADEA or Act), 29 U.S.C. 621 *et seq.* The Equal Employment Opportunity Commission (EEOC or Commission) administers and enforces the ADEA, and has promulgated regulations prescribing the form and content of charges under the Act. In addition, the resolution of the question presented will inform the requirements for a charge alleging discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, and Title I of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12111 *et seq.* The EEOC has promulgated similar regulations under those statutes prescribing the form and content of charges filed with the Commission, and it has also entered

into agreements with various federal and state agencies stating that complaints filed with those agencies may constitute charges when they involve matters within the Commission's jurisdiction. In addition, the Attorney General has enforcement responsibilities under Title VII and the ADA with respect to state and local employers. The EEOC has a direct interest in the validity of its "charge" regulations, and the Court's resolution of this case will impact the enforcement responsibilities of both the EEOC and the Attorney General.

STATEMENT

1. The ADEA makes it unlawful for an employer to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. 623(a)(1). As to private employers, that prohibition may be enforced in public actions brought by the Commission, 29 U.S.C. 626(b), and through private suits, 29 U.S.C. 626(c).[1] Enforcement under the ADEA is generally triggered by the filing of "a charge alleging unlawful discrimination" with the Commission within 180 or 300 days of the alleged unlawful practice, depending on the jurisdiction. 29 U.S.C. 626(d). Acting pursuant to an express grant of authority, see 29 U.S.C. 628, the EEOC has adopted regulations that define the term "charge," 29 C.F.R. 1626.3; establish three minimum requirements regarding a charge's form, 29 C.F.R. 1626.6; and identify other information that charges "should contain," 29 C.F.R. 1626.8.

The ADEA provides that, "[u]pon receiving such a charge [of discrimination], the Commission shall promptly notify all persons named in the charge as prospective defendants * * *

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[1] A separate provision of the ADEA addresses age discrimination by federal employers. See 29 U.S.C. 633a (Supp. IV 2004). The procedures set forth in Section 633a differ in important respects from those applicable to private employers and are not at issue here.

and shall promptly seek to eliminate any alleged unlawful employment practice by informal methods of conciliation, conference, and persuasion." 29 U.S.C. 626(d). Such attempts at conciliation are a statutory prerequisite to an action by the Commission. 29 U.S.C. 626(b). In contrast, private plaintiffs may initiate suit at any point starting 60 days after filing a timely charge, 29 U.S.C. 626(d), and ending 90 days after receiving notice that the Commission has terminated its own proceedings, 29 U.S.C. 626(e). Unlike Title VII (see 42 U.S.C. 2000e-5(f)(1)), there is no requirement that an ADEA plaintiff receive a right-to-sue letter or other EEOC document before filing suit.

2. Respondent Patricia Kennedy (respondent) is a courier for petitioner, Federal Express Corporation. J.A. 265. On December 3, 2001, respondent contacted the EEOC's Tampa field office and completed an EEOC "Intake Questionnaire" form. *Ibid.*; C.A. App. 108a.[2] Respondent's form contains name, address, and telephone information for petitioner and respondent. J.A. 265. It states that respondent has been subjected to "age discrimination" that has affected "virtually every facet of [respondent's] job, [i]ncluding but not limited to starting time; courier performance reviews; late packages

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[2] The Intake Questionnaire form that respondent submitted is an outdated 1987 version of the standard Form 283 contained in the EEOC Compliance Manual. See 1 EEOC Compl. Man. (BNA) Exh. 1-B at 1:0005-1:0006 (June 2001) (*EEOC Manual*). Among other differences, standard Form 283: (1) is captioned "Charge Questionnaire"; (2) states that it will be deemed "a sufficient charge of discrimination" where it "constitutes the only timely written statement of allegations of employment discrimination"; and (3) describes its "Routine Uses" as determining whether the Commission has jurisdiction over "allegations of employment discrimination and * * * provid[ing] such charge filing counseling as is appropriate." In the past, many of the EEOC's field offices modified Form 283 in various respects. On December 4, 2006, however, the EEOC adopted a Uniform Intake Questionnaire for use by its National Contact Center, and, on August 30, 2007, mandated its use by all field offices.

and data scans; on-the-job injuries; and other employee benefits." *Ibid.* According to the form, the discrimination has spanned "the past several years," with the most recent harm having occurred on December 3, 2001, the date on which the form was initially completed. *Ibid.* The form also expresses respondent's consent to have her identity disclosed to petitioner. *Ibid.*

Respondent attached a five-page notarized affidavit to the form detailing her allegations. J.A. 266-274. The affidavit contains a caption with spaces for a "Case Name" and a "Case No." J.A. 266. The affidavit begins by stating that respondent has been "given assurances by an Agent of [the EEOC] that this Affidavit will be considered confidential * * * and will not be disclosed as long as the case remains open unless it becomes necessary for the Government to produce the affidavit in a formal proceeding." *Ibid.* The affidavit contains detailed allegations about how petitioner has used its "Best Practices Pays" program to "systematically target[]" respondent and other older workers, thus making it more difficult for them to meet petitioner's "*minimum acceptable performance standards* or *MAPS*." J.A. 267; see J.A. 267-272.

The affidavit closes by stating:

> Please force [petitioner] to end their age discrimination plan so we can finish out our careers absent the unfairness and hostile work environment created with their application of *Best Practices/ High-Velocity Culture Change.*

J.A. 273.

The EEOC's Tampa field office did not serve notice of respondent's December 3, 2001, submission on petitioner or begin an investigation, as the Commission is required to do under Section 626(d) when it receives a charge. Pet. App. 5a. On April 30, 2002, respondent and thirteen other individuals, who are also respondents here, filed a representative action

alleging that petitioner had violated the ADEA and various state laws proscribing age discrimination. J.A. 19-35.[3]

3. The district court granted petitioner's motion to dismiss the complaint. Pet. App. 31a-42a. The court concluded that respondent's December 3, 2001, submission did not constitute a "charge" under the ADEA because the Act does not "specifically state[]" that "an intake questionnaire or affidavit constitute[s] sufficient notice to the EEOC of alleged discrimination." *Id.* at 39a. Although the district court acknowledged that other courts had "on occasion * * * found that an intake questionnaire constitutes a formal charge," it stated that those rulings "involved situations where the plaintiff has been led by the EEOC to believe that the questionnaire alone constituted sufficient notice." *Ibid.*

4. The court of appeals reversed. Pet. App. 3a-23a. The court held that "a writing submitted to the EEOC" is a "charge" within the meaning of the ADEA when it contains the information required by EEOC regulations and a "reasonable person" would conclude "that the grievant has manifested an intent to activate the Act's machinery." *Id.* at 15a (quoting *Bihler* v. *Singer Co.*, 710 F.2d 96, 99 (3d Cir. 1983)). While recognizing the importance of the EEOC's statutory notice and conciliation duties, the court refused to adopt an interpretation that "would * * * hold individuals accountable for the failings of the agency." *Id.* at 16a. The court then held that respondent's December 3, 2001, submission consti-

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[3] After filing suit, respondent submitted to EEOC a form captioned "Charge of Discrimination," which is also known as a "Form 5 charge." J.A. 275-276; see 1 *EEOC Manual* Exh. 2-C at 2:0009-2:0010 (Aug. 2002). This two-page form, which was signed on May 30, 2002, contains the same basic information as respondent's December 3, 2001, submission, including contact information, an estimate of petitioner's number of employees, an assertion of unlawful age discrimination, and a brief factual narrative. J.A. 275. The Commission assigned a charge number to this submission. *Ibid.*

tutes a "charge" under that test, because it satisfied the EEOC's regulations and "communicated [respondent's] intent to activate the EEOC's administrative process." *Id.* at 18a. In reaching the latter conclusion, the court pointed, *inter alia*, to the affidavit's "forceful tone and content," respondent's consent to have her identity disclosed to petitioner, and respondent's request for EEOC to "force [petitioner] to end their age discrimination plan." *Id.* at 19a (quoting J.A. 273).[4]

SUMMARY OF ARGUMENT

The court of appeals correctly held that respondent's intake questionnaire and affidavit constitute "a charge alleging unlawful discrimination" under the ADEA.

A. In answering the question presented, the Court should follow the framework set forth in *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984). The first inquiry under *Chevron* is "whether Congress has directly spoken to the precise question at issue." *Id.* at 842. The answer to that question is no, because the ADEA does not define or otherwise provide concrete guidance as to the meaning of "charge." Petitioner argues that Congress has directly spoken to the issue by defining "charge" based on whether the EEOC fulfills its notice and conciliation obligations with respect to a submission. That argument is directly contradicted by the statute's text.

The pertinent provision of the ADEA states that, "[u]pon receiving such a charge," the EEOC shall promptly notify the employer and seek to eliminate any unlawful discrimination through conciliation. 29 U.S.C. 626(d). But the Act makes clear that the notice and conciliation obligations do not define

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[4] Having concluded that respondent's December 3, 2001, submission was a charge, the court of appeals held that eleven other plaintiffs who had not submitted anything to EEOC could "piggyback" on that filing. Pet. App. 21a. That holding is not before this Court. See Pet. i.

what a charge *is*, because those obligations do not attach until the EEOC has received "such a charge." *Ibid.* In addition, the notice and conciliation requirements serve different objectives than the charge-filing requirement. A contrary construction would conflict with the Court's analysis of an analogous statutory question in *Edelman* v. *Lynchburg College*, 535 U.S. 106 (2002), unfairly penalize private parties for agency mistakes, and mean that the same submission could be treated differently based solely on agency conduct outside the complainant's control.

B. Because Congress has not directly spoken to the question of what is a "charge," resolution of this case turns on whether the agency has adopted "a permissible construction of the statute." *Chevron*, 467 U.S. at 843. It has. Acting pursuant to an express grant of authority, the EEOC has reasonably, and thus permissibly, defined "charge" as a submission that meets the form and content requirements set forth in the EEOC's regulations and objectively manifests a submitter's intent to make a formal accusation that a named party has engaged in unlawful discrimination. That interpretation is consistent with the dictionary meaning of "charge," *i.e.*, an accusation or indictment; gives effect to the EEOC's regulations, the EEOC Compliance Manual, and formal administrative guidances; and avoids the arbitrary and unfair results of tying the definition of charge to conduct outside a complainant's control.

In practice, most of the charges meeting the EEOC's definition are made on the EEOC's Form 5, which is entitled "Charge of Discrimination." But as both the EEOC Compliance Manual and binding guidances issued in 2002 and 2007 expressly state, "correspondence," including intake questionnaires, may also qualify as charges. That conclusion is consistent with Congress's use of the general term "charge" and the remedial object of the statute. Although the EEOC's

past practice at the field office level has not been uniform in treating such submissions as charges, the EEOC has recently taken steps to ensure that all submissions constituting charges—including intake questionnaires or other correspondence—are treated as charges, as required by the ADEA.

C. The EEOC's administrative interpretation of "charge" is entitled to deference. The agency's interpretation is consistent with the text and object of the ADEA and gives "specificity to a statutory scheme that the [Commission is] charged with enforcing and reflect[s] the considerable experience and expertise that the [EEOC] ha[s] acquired over time with respect to the complexities of" dealing with the wide variety of submissions it receives from members of the public. *Gonzales* v. *Oregon*, 546 U.S. 243, 256 (2006). Although the objective intent requirement is not expressly stated in EEOC regulations, it is embodied in the EEOC Compliance Manual and two formal advisory memoranda, and reflects a permissible construction of the EEOC's regulations. See *Auer* v. *Robbins*, 519 U.S. 452 (1997). In addition, the EEOC has reasonably determined that its construction appropriately accounts for the fact that most submissions are made by laypersons who are unlikely to appreciate the legal requirements for initiating a case. The admittedly uneven past practice in processing submissions at the field office level does not deprive the EEOC's interpretation of the deference that is customarily accorded such agency interpretations.

D. Respondent's December 3, 2001, submission constitutes "a charge alleging unlawful discrimination" under the ADEA. There is no dispute that respondent's submission complies with all of the regulatory requirements as to a charge's form and content. In addition, respondent's intake questionnaire and accompanying affidavit objectively manifest an intent to make a formal accusation of unlawful age discrimination against petitioner. In particular, on the intake

questionnaire respondent specifically gives consent for the EEOC to disclose her identity to petitioner, and that document was accompanied by a five-page notarized affidavit that details the alleged discrimination and asks the EEOC to "force [petitioner] to end [such] discrimination." J.A. 266-274. That submission clearly and objectively manifests an intent to make a formal accusation of unlawful age discrimination.

E. The fact that the EEOC failed to fulfill its notice and conciliation duties upon receiving respondent's charge does not transform that charge into something else, and it does not bar respondent's suit. As discussed, the ADEA's text establishes no such rule, and the background rule is that a private party's right to sue is generally not dependent on the government's faithful performance of its own duties. See *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422 (1982). At the same time, if the EEOC has failed to comply with its statutory duties, a district court may take steps to minimize any prejudice to the defendant. For example, a court may stay proceedings—including discovery—for a period to provide an opportunity for conciliation, dismiss the suit based on the doctrine of laches if the plaintiff has delayed unreasonably in filing it, or take the defendant's lack of timely notice into account when crafting evidentiary and other trial-management rulings. But when the agency regrettably drops the ball in handling a timely submitted charge, defendants are not entitled to a windfall in the form of the dismissal of a potentially meritorious age discrimination suit.

ARGUMENT

THE COURT OF APPEALS CORRECTLY HELD THAT RESPONDENT'S INTAKE QUESTIONNAIRE AND ACCOMPANYING AFFIDAVIT CONSTITUTE "A CHARGE ALLEGING UNLAWFUL DISCRIMINATION" UNDER THE ADEA

The question presented is what constitutes "a charge alleging unlawful discrimination" under the ADEA. 29 U.S.C. 626(d). In answering that question, this Court should follow the framework established by *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984). Under that familiar framework, the Court first considers "whether Congress has directly spoken to the precise question." *Id.* at 842. If the answer to that question is no, then the Court considers "whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. As explained below, in this case, a proper application of the *Chevron* framework leads to the conclusion that the EEOC's interpretation should be given effect: a "charge" is a submission that meets the form and content requirements set forth in the Commission's regulations and objectively manifests a submitter's intent to make a formal accusation that a named party has engaged in unlawful discrimination. Applying that interpretation, respondent's intake questionnaire and accompanying affidavit constitute a charge within the meaning of the ADEA.

A. Congress Has Not Directly Spoken To What Is A "Charge" Under The ADEA

The ADEA does not directly answer the question presented because it does not define the term "charge." Although petitioner explicitly acknowledged in its petition (at 8) that "the ADEA does not define what constitutes a charge," it now asserts that the Act "straightforwardly defines 'charge'" as a document that "activate[s] the EEOC's

investigative machinery." Pet. Br. 11-12. That argument is directly contradicted by the ADEA's text. After referring in general terms to a "charge alleging unlawful discrimination," the Act states that, "[u]pon receiving such a charge," the EEOC shall promptly notify the employer and seek to eliminate any unlawful discrimination through conciliation. 29 U.S.C. 626(d). But a plain reading of Section 626(d) makes clear that the notice and conciliation obligations do not define what a charge *is* in the first place, because those obligations do not attach until the EEOC has received "such a charge." *Ibid.* Treating the notice and conciliation obligations as elements of what is a charge triggering those obligations would require an implausible "structural and logical leap." *Edelman* v. *Lynchburg Coll.*, 535 U.S. 106, 112 (2002).

That conclusion follows lock step from the result that this Court reached in *Edelman* in rejecting an analogous statutory argument as to the meaning of "charge" under Title VII. Like the ADEA, Title VII requires that prospective plaintiffs file a "charge" within a specified period, 42 U.S.C. 2000e-5(e)(1), but, unlike the ADEA, it also declares that "[c]harges shall be in writing under oath or affirmation," 42 U.S.C. 2000e-5(b). *Edelman* concerned the validity of an EEOC regulation permitting "an otherwise timely filer to verify a charge after the time for filing had expired." 535 U.S. at 109.

The Court began by rejecting the court of appeals' conclusion that the EEOC regulation was invalid because Title VII itself defined "charge" as a document made under oath or affirmation. *Edelman*, 535 U.S. at 112-113. The Court stressed that neither the timing nor the oath provision defined "charge," and that the term was "likewise undefined elsewhere in the statute." *Id.* at 112. Nor did either provision "incorporate[] the other so as to give a definition by necessary implication." *Ibid.* The Court further determined that "the two quite different objectives of the timing and verification

requirements"—which it identified as "encourag[ing] a potential party to raise a discrimination claim before it gets stale" and "protecting employers from the disruption and expense of responding to such a claim unless a complainant is serious enough and sure enough to support it by oath subject to liability for perjury," respectively—"st[oo]d in the way of reading 'charge' to subsume them both by definition." *Id.* at 112-113.

The *Edelman* analysis precludes a finding that the ADEA defines "charge" as a document that is served on an employer and results in an attempt at conciliation. The ADEA's notice and conciliation command does not purport to say what a charge *is*, and the term "charge" is likewise undefined in the Act's separate definitions section (29 U.S.C. 630). The Act's use of the phrase "*such a* charge" in both the timing and notification provisions further confirms that the notice and conciliation requirements do not inform the *meaning* of the term "charge," but instead are obligations *triggered* by the receipt of a charge. And unlike the verification provision in *Edelman*, the ADEA's notice and conciliation command does not even involve the contents of the required filing, and it is directed to the entity that receives the filing (the EEOC) rather than the person who is required to make it.

In addition, as in *Edelman*, the requirements set forth in Section 626(d)'s three sentences serve distinct, albeit complementary, purposes. A complainant's filing of "a charge alleging unlawful discrimination" alerts the EEOC to the existence of potentially unlawful conduct and provides the Commission with enough information to begin investigating. The requirement that "[s]uch a charge" be filed within a specified period ensures that a prospective plaintiff has not slept on her rights and weeds out stale claims. And the Commission's mandatory duties to alert the employer and attempt conciliation whenever it receives "such a charge" are designed to provide prompt notice to prospective defendants and to facilitate in-

formal resolutions of disputes that do not involve the courts, when possible.

The untenable consequences of petitioner's construction further confirm that the ADEA does not define "charge" based on what the EEOC is required to do after receiving one. Under that construction, the same document may, or may not, be a "charge" based solely on factors outside a complainant's control. In addition, although petitioner purports to remain agnostic (Pet. Br. 28 n.12), an inescapable implication of its argument is that no filing—including an EEOC Form 5—may constitute a "charge" sufficient to preserve a private plaintiff's right to sue whenever the EEOC fails, for whatever reason, to comply with its statutory obligations to serve notice and attempt conciliation. See pp. 25-27, *infra*.

B. The EEOC Has Reasonably, And Thus Permissibly, Defined "Charge" Within The Meaning Of The ADEA

Because Congress has not directly spoken to the issue, the EEOC has issued regulations—and binding interpretations of those regulations—that together define "charge" as a submission that contains the elements required by the EEOC's regulations and is received under circumstances that objectively indicate an intent to make a formal accusation of unlawful conduct against an identified person or entity. Because that definition is a reasonable construction of both the ADEA and the EEOC's own regulations, it is entitled to "substantial deference." *Gonzales* v. *Oregon*, 546 U.S. 243, 255 (2006).

The ADEA authorizes the EEOC to "issue such rules and regulations as it may consider necessary or appropriate for carrying out this chapter." 29 U.S.C. 628. In 1983, after engaging in formal notice-and-comment rulemaking, the Commission issued regulations regarding the form and content of ADEA charges. See 46 Fed. Reg. 9970 (1981) (notice of proposed rulemaking); 48 Fed. Reg. 138 (1983) (final rule); 26

C.F.R. 1626. Because Congress explicitly "left a gap for the agency to fill" as to the meaning of "charge," and because "there is an express delegation of authority" to issue regulations of this kind, the EEOC's regulations are entitled to *Chevron* deference. *Chevron*, 467 U.S. at 843-844; see *United States* v. *Mead Corp.*, 533 U.S. 218, 229-231 (2001); *Edelman*, 535 U.S. at 120, 122 (O'Connor, J., joined by Scalia, J., concurring in the judgment).

The EEOC's regulations do three things that are pertinent here. First, they define "charge" as "a statement filed with the Commission by or on behalf of an aggrieved person which alleges that the named prospective defendant has engaged in or is about to engage in actions in violation of the Act." 29 C.F.R. 1626.3. Second, they establish three minimum requirements: "A charge shall be in writing and shall name the prospective respondent and shall generally allege the discriminatory act(s)." 29 C.F.R. 1626.6. Third, they set forth information that charges "should contain," including contact information for all persons against whom the charge is being made; a "clear and concise" description of the allegedly discriminatory acts, including relevant dates; the approximate number of people employed by the proposed respondent; and whether proceedings have been commenced before an appropriate State agency. 29 C.F.R. 1626.8(a). That same provision, however, declares that "a charge is sufficient when the Commission receives * * * either a written statement or information reduced to writing by the Commission that conforms to the requirements of § 1626.6." 29 C.F.R. 1626.8(b).[5]

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[5] Because the EEOC need not receive a charge to initiate public enforcement under the ADEA, see *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991), the regulations also define a "complaint" as "information received from any source, that is not a charge, which alleges that a named prospective defendant has engaged in or is about to engage in actions in violation of the Act." 29 C.F.R. 1626.3. Contrary to the Chamber of Commerce's suggestion

At the same time, although the regulations do not expressly so provide, the EEOC has reasonably concluded that not every communication possessing the three characteristics set forth in 29 C.F.R. 1626.6 is a "charge alleging unlawful discrimination" under Section 626(d). Rather, the EEOC's considered view is that to constitute a charge, a written submission must objectively manifest an intent to make a formal accusation that an identified person or entity "has engaged or is about to engage in action in violation of the Act." 29 C.F.R. 1626.3. That objective intent requirement squares with the common dictionary definition of the term "charge"—*i.e.*, "[A]n accusation or indictment," *The American Heritage Dictionary of the English Language* 226 (1976)[6]—and is embodied in the EEOC Compliance Manual and two formal advisory memoranda. See pp. 16-18, *infra*.

A completed Form 5 "Charge of Discrimination" is the prototypical example of a "charge" that is received and processed by the EEOC. But the EEOC has never formally taken the position that *only* a completed Form 5 may constitute a "charge." That Form is neither contained nor referenced in any of the EEOC's regulations. Form 5 is included as an exhibit in the EEOC Compliance Manual, a publication that sets forth suggested guidance for field offices. See 1

(at 12), neither the Commission's regulations, nor any other EEOC document states that "[t]he completed Intake Questionnaire is the complaint [and a Form 5] is the charge," *Early* v. *Bankers Life & Cas. Co.*, 959 F.2d 75, 80 (7th Cir. 1992), and *Early* itself acknowledged that intake questionnaires may sometimes constitute charges, see *id.* at 80-81.

[6] See also *Funk & Wagnalls New Standard Dictionary of the English Language* 451 (1945) ("An accusation, allegation, or imputation, or the subject-matter thereof"); *The Random House Dictionary of the English Language* 248 (1966) ("an accusation"; synonyms: "indictment, imputation, allegation"); 2 *The Oxford English Dictionary* 284 (1978) ("Attribution or imputation of something culpable; accusation").

EEOC Manual Exh. 2-C at 2:0009-2:0010 (Aug. 2002). But the Form's inclusion in the EEOC Compliance Manual merely indicates that a Form 5 is typically *sufficient* to constitute a charge, not that it is the only thing that may constitute one. Cf. Fed. R. Civ. P. 84 (emphasizing that "[t]he forms contained in the Appendix of forms are *sufficient* under the rules and are intended to indicate the simplicity and brevity of statement which the rules contemplate") (emphasis added).

Indeed, far from suggesting that a Form 5 is the only document that may constitute a charge, Section 2.2(b) of the EEOC Compliance Manual specifically instructs that "correspondence"—which another Section defines as "[a]ll written requests for assistance unrelated to a pending charge/complaint, whether prepared on an EEOC form or not"—should be treated as a charge whenever it "contains all information necessary to begin investigating, constitutes a clear and timely request for EEOC to act, and does not express concerns about confidentiality or retaliation." 1 *EEOC Manual* § 2.2(b) at 2:0001 (Aug. 2002); see *id.* § 1.6, at 1:0001 (June 2001) (definition of "correspondence"). In addition, the case law confirms that the EEOC has in practice treated some non-Form 5 documents as charges,[7] and the EEOC has for decades taken the position in litigation that intake questionnaires and accompanying documents may sometimes constitute charges.[8]

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[7] See, *e.g.*, *Wilkerson* v. *Grinnell Corp.*, 270 F.3d 1314, 1316 (11th Cir. 2001); *Philbin* v. *General Elec. Capital Auto Lease, Inc.*, 929 F.2d 321, 322 (7th Cir. 1991) (per curiam); *Price* v. *Southwestern Bell Tel. Co.*, 687 F.2d 74, 76 (5th Cir. 1982).

[8] See, *e.g.*, Gov't Amicus Br. at 10-15, *Casavantes* v. *California State Univ.*, 732 F.2d 1441 (9th Cir. 1984) (No. 83-2087); Gov't Amicus Br. at 5-6, 12-13, *Philbin*, *supra* (No. 90-2945); Gov't Br. at 12-15, *Shempert* v. *Harwick Chem. Corp.*, 151 F.3d 793 (8th Cir. 1998) (No. 97-1634), cert. denied, 525 U.S. 1139 (1999); Gov't Amicus Br. at 15-19, *Scruggs* v. *University Health Serv.*, 281 F.3d

Furthermore, top EEOC officials have twice in recent years reiterated, in binding guidances issued to all field offices, that there are circumstances in which intake questionnaires and other correspondence may constitute charges. On February 21, 2002, the EEOC's Director of the Office of Field Programs (Director) issued a Memorandum mandating use of the EEOC Compliance Manual standard for determining whether a non-Form 5 submission constitutes a charge: "When correspondence contains all the information necessary to begin investigating, constitutes a clear and timely request for EEOC to act, and does not express concerns about confidentiality or retaliation, we should docket it as a charge; acknowledge it [with the complainant]; and serve a copy on the respondent." App., *infra*, 5a. On August 13, 2007, the Director and the EEOC's General Counsel issued a joint Memorandum reiterating that "[a]n intake questionnaire or other correspondence can constitute a charge under the statutes we enforce if it contains all the information required by EEOC regulations governing the contents of a charge and constitutes a clear request for the agency to act." *Id.* at 7a. Those formal agency memoranda are binding on all of the EEOC's field offices and represent the Commission's considered position

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1285 (11th Cir. 2001) (Table) (No. 01-10935). Although the EEOC has consistently taken the position in litigation that documents other than Form 5s may constitute charges, it has at times argued that a particular document constituted a charge solely because it met the form and content requirements set forth in EEOC regulations. See, *e.g.*, Gov't Amicus Br. at 17, *Gordon* v. *Shafer Contracting Co.*, 469 F.3d 1181 (8th Cir. 2006) (No. 06-1963) (arguing that because an intake questionnaire satisfied "all of the statutory and regulatory requirements, * * * no more [was] needed to" deem that document a charge). Those briefs are inconsistent with the EEOC's considered view that a submission must not only meet the form and content requirements but also manifest the requisite intent. In any event, the EEOC has consistently taken the position that documents other than Form 5s may qualify as charges.

regarding the proper interpretation of the EEOC's formally promulgated regulations.[9]

Finally, the Commission has determined that an objective intent requirement benefits all concerned. Persons who have contacted the EEOC will not be unpleasantly surprised to learn that their employers have been notified of charges that they did not intend to operate as formal accusations. The EEOC will not be required to expend already stretched resources investigating perhaps tens of thousands of submissions that were never intended to be formal accusations of unlawful discrimination, or to attempt conciliation in situations "where the employee, on his own, has received satisfaction from the employer." *Bihler* v. *Singer Co.*, 710 F.2d 96, 99

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[9] These Memoranda are also posted on the EEOC's website. See Memorandum (Feb. 21, 2002) <http://www.eeoc.gov/charge/memo-2-21-02.html>; Memorandum (Aug. 13, 2007) <http://www.eeoc.gov/charge/memo-8-13-07.html>.

From February 2, 2005, until September 18, 2007, one of the answers set forth in a database of "Frequently Asked Questions" maintained on the EEOC's website stated that "[y]our charge is filed when the completed, signed Form 5 is received back in the EEOC field office and a charge number has been issued." Although EEOC's preferred practice is indeed to receive a completed Form 5 whenever possible, see p. 21, *infra*, to the extent that this statement suggested that Form 5s are the only documents that may constitute charges, it was inconsistent with EEOC's considered position and past Commission practice. See pp. 15-18, *supra*. Having been made aware of this entry, the EEOC's Director of the Office of Field Programs directed that the following sentence be inserted after the language quoted above: "An intake questionnaire or other correspondence can also constitute a charge under the statutes we enforce if it contains all the information required by EEOC regulations governing the contents of a charge and constitutes a clear request for the EEOC to act." The revised language is available on the Commission's website in the Frequently Asked Questions database under the entry "How do I file a charge of employment discrimination?" EEOC, *FAQs* (visited Sept. 21, 2007) <https://eeoc.custhelp.com/cgi-bin/eeoc.cfg/php/enduser/std_alp.php?p_sid=r9xBKEAh&p_lva=&p_sp=&p_li=>.

(3d Cir. 1983). And employers will not be called upon to respond to submissions that did not constitute formal accusations. Cf. *Edelman*, 535 U.S. at 115 (stating that "it is no small thing to be called upon to respond" to a charge of unlawful employment discrimination).[10]

C. The EEOC's Interpretation Warrants Deference

The EEOC's position—that a "charge" is a submission that contains the elements required by the EEOC's regulations and objectively indicates an intent to make a formal accusation of unlawful conduct against an identified person or entity—reflects a reasonable construction of the ADEA and the Commission's own regulations. Despite the policy objections of petitioner and its amici to the EEOC's interpretation, the Commission's view "simply cannot be said to be unreasonable." *Auer* v. *Robbins*, 519 U.S. 452, 458 (1997); see *Edelman*, 535 U.S. at 114. Accordingly, because the ADEA "entrusts matters of judgment such as this to the [Commission], not the federal courts," this Court should give effect to the EEOC's view. *Auer*, 519 U.S. at 458.

Deference is warranted to the EEOC's interpretation of its own regulations. As in *Auer*, "the underlying regulations g[i]ve specificity to a statutory scheme that the [Commission is] charged with enforcing and reflect the considerable experience and expertise that the [EEOC] ha[s] acquired over time with respect to the complexities of" dealing with the wide variety of submissions it receives from members of the public. *Gonzales*, 546 U.S. at 256; *EEOC* v. *Commercial Office Prods.*

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[10] The EEOC does not track the number of documents it receives per year that satisfy the minimum criteria set forth in 29 C.F.R. 1626.6. In fiscal year 2006, however, the EEOC received 175,334 "inquiries," which include contacts ranging from phone calls through written submissions, and docketed 76,146 "charges," which include Form 5s, intake questionnaires, and other correspondence.

Co., 486 U.S. 107, 125 (1988) (O'Connor, J., concurring in part and concurring in the judgment) ("deference is particularly appropriate" with respect to "technical issue[s] of agency procedure"). In addition, although the EEOC's regulations do not explicitly articulate an objective intent requirement, the definition of "charge" set forth in 29 C.F.R. 1626.3 "comfortably bears" (*Auer*, 519 U.S. at 461) the EEOC's view—reflected in the EEOC Compliance Manual and formal advisory memoranda—that a document is not a charge unless the circumstances objectively indicate an intent to make a formal accusation of unlawful conduct. See note 6, *supra*.

The EEOC's position reflects its expertise in issues of agency procedure. The EEOC has determined that a functional definition that looks to a complainant's intent is appropriate given the reality that most submissions are received from laypersons, who are in all likelihood unaware of the precise legal requirements for initiating proceedings, much less the various forms that the agency employs. See *Love* v. *Pullman Co.*, 404 U.S. 522, 527 (1971) (Title VII case) (stating that "technicalities" regarding the charging process "are particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process"); accord *Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750, 761 (1979) (making similar observation in ADEA case).[11]

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[11] The EEOC's approach is also in harmony with the maxim that "document[s]" filed by *pro se* litigants "are 'to be liberally construed.' " *Erickson* v. *Pardus*, 127 S. Ct. 2197, 2200 (2007) (per curiam) (quoting *Estelle* v. *Gamble*, 429 U.S. 97, 106 (1976)). See, *e.g.*, *Smith* v. *Barry*, 502 U.S. 244, 248-249 (1992) (stating that court of appeals had erred in not considering the possibility that a *pro se* litigant's informal brief could function as a notice of appeal). Equitable tolling should also be available in situations where an EEOC or state official misleads a complainant into believing that a non-qualifying document was, in fact, a charge. See, *e.g.*, *Schlueter* v. *Anheuser-Busch, Inc.*, 132 F.3d 455, 459 (8th Cir. 1998); *Early*, 959 F.2d at 81.

That functional approach allows for some line-drawing in borderline cases, but the EEOC has taken steps to attempt to reduce any uncertainty. As this Court noted in *Edelman*, even in situations where an intake questionnaire or correspondence would constitute a charge under the EEOC's regulations, "[t]he general practice of EEOC staff members [has been] to prepare a formal [Form 5] charge of discrimination for the complainant to review" before a charge is formally docketed. 535 U.S. at 115 n.9. That practice ensures that a person intends to make a formal accusation of unlawful discrimination against an entity before the notice and conciliation process is commenced, benefitting complainants, the EEOC, and employers alike. See pp. 18-19, *supra*.

Despite its advantages in clarifying matters, this approach raises problems in situations where a potentially qualifying submission cannot be transferred to a Form 5 either within the 180/300 day period in which a private complainant is required to file a charge, or soon enough to enable the EEOC to comply with its duty to afford "prompt[] notic[e]" to the accused party. 29 U.S.C. 626(d).[12] In the former situation, the EEOC Compliance Manual has for a number of years directed staff to treat any qualifying submission as a charge and provide notice to the employer. 1 *EEOC Manual* § 2.2(a)(1) and (2), at 2:0001 (Aug. 2002).[13]

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[12] Although the EEOC does not maintain information about how long it takes to transpose information from intake questionnaires or other correspondence to Form 5s, the agency does have internal statistics showing the length of time between initial inquiries (which include phone calls, letters, office visits, and intake questionnaires), and the docketing of ADEA charges. In fiscal year 2006, the total time was less than ten days in the majority of cases (9208 out of 16,595), and the mean period was 28.1 days.

[13] The Chamber of Commerce errs in asserting (at 19-20) that intake questionnaires cannot constitute charges because their disclosure would violate the Privacy Act, 5 U.S.C. 552a (2000 & Supp. V 2005). The ADEA does not require

Moreover, both the February 21, 2002, and the August 13, 2007, Memoranda reiterate that agency policy requires that notice be served within ten days of receipt of any document constituting a "charge" under the test set forth in the EEOC Compliance Manual. App., *infra*, 5a, 7a. The August 13, 2007, Memorandum further instructs that in situations where it does not appear that a completed Form 5 may be obtained and served within ten days, Commission staff are required to "take steps to promptly ascertain whether the submitter intended to initiate proceedings and, if so, docket the questionnaire or other correspondence as a charge and serve notice on the respondent within ten days of receipt." *Id.* at 7a. Such an intent, the Memorandum instructs, "can be inferred from a plain reading of the correspondence or determined by contacting the author/submitter." *Ibid.* Thus, the EEOC has taken concrete steps to ensure that such charges are processed in accordance with its statutory duties.

Finally, the Commission's view is by no means a "*post hoc* rationalization[]" or a "convenient litigating position." *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 212-213 (1988) (quoting *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 168 (1962)). Although EEOC briefs have not always been consistent in advocating use of the objective intent standard, see note 8, *supra*, the language of current Section 2.2(b) has been contained in the EEOC Compliance Manual since September 1988, and the first of the two Memoranda (App., *infra*, 4a-5a) was issued more than five years ago, long before the EEOC's central office became aware of this case. Cf.

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that employers be served with a copy of the charge; it requires only "notice" that such a charge has been filed. 29 U.S.C. 626(d); see 29 C.F.R. 1626.11. In cases where the EEOC has docketed non-Form 5 documents as charges, it has typically sent notice without serving a copy of the correspondence itself. See, *e.g.*, *Wilkerson*, 270 F.3d at 1316; *Philbin*, 929 F.2d at 322.

Long Island Care at Home, Ltd. v. *Coke*, 127 S. Ct. 2339, 2349 (2007) (deferring to agency interpretation set forth only in an internal document written in response to the litigation then before the Court). In short, "[t]here is simply no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question," *Auer*, 519 U.S. at 462, and the Commission's interpretation of its own regulations is thus controlling.

D. Respondent's December 3, 2001, Submission Constitutes A "Charge" Under The EEOC's Regulations

Respondent's intake questionnaire and accompanying affidavit possess all the elements required by the EEOC's charge regulations, and contain all of the information that those regulations state that a charge "should" contain. Compare J.A. 265-274, with 29 C.F.R. 1626.6, 1626.8; see Pet. App. 18a. In addition, respondent's December 3, 2001, submission objectively manifests an intent to make a formal accusation of unlawful age discrimination against petitioner. In particular, on the first page of the intake questionnaire, respondent asserts that petitioner has engaged in a pattern of "age discrimination," consents to having her identity disclosed to petitioner, and affirms that she has not "filed an EEOC charge *in the past*." J.A. 265 (emphasis added).

Moreover, respondent, unlike most people who submit intake questionnaires, attached a notarized affidavit outlining her allegations of unlawful discrimination in considerable detail. See *Wilkerson* v. *Grinnell Corp.*, 270 F.3d 1314, 1320-1321 (11th Cir. 2001) (stating that "verification indicates to the filing party that the information must be accurate because it is legally significant"). That affidavit contains blank spaces for a "Case Name" and a "Case No.," J.A. 266, and expresses an understanding that a "case [is] open," *ibid.* Further, the

affidavit closes by calling upon the EEOC to "force [petitioner] to end their age discrimination." J.A. 273.

Neither the pre-printed intake questionnaire that respondent used nor anything respondent wrote on the form or in her affidavit indicates that she did not intend the submission to be a charge. Under the caption of "routine uses," the preprinted text on the second page of the intake questionnaire states that information contained on the form is used by EEOC employees to determine whether the "Commission has jurisdiction over *potential charges*" and to provide "*pre-charge* filing counseling as is appropriate." J.A. 265 (emphases added). But that general language is perfectly consistent with the fact that any submission is a *potential* charge, and that the EEOC does not make a determination whether a submission is in fact a charge until it has reviewed the information and concluded that it meets the form and content requirements of its regulations and manifests the requisite intent. And as a practical matter, a great many intake questionnaires do not meet those requirements. More fundamentally, the focus here is not on how *the EEOC* may have anticipated that a particular form would typically be used, but rather the objective intent of the person who completed it.

The argument that respondent's December 3, 2001, submission is an ADEA charge is substantially stronger than the corresponding argument in *Edelman*. As Judge Luttig noted on remand, Edelman himself characterized the initial letter he sent the Commission "not as a charge, but rather as a request for a charge," his two letters alleged "different discriminatory conduct," and his second letter expressly asked that the EEOC refrain from notifying his employer. *Edelman* v. *Lynchburg Coll.*, 300 F.3d 400, 406 (4th Cir. 2002) (Luttig, J., dissenting). Here, in contrast, nothing respondent wrote in her intake questionnaire or accompanying affidavit manifests a belief that the December 3, 2001, submission is not a charge;

the questionnaire, the affidavit, and respondent's subsequently filed Form 5 all allege the same essential course of discrimination; and respondent's intake questionnaire expressly authorizes the Commission to notify petitioner.

E. The EEOC's Failure To Fulfill Its Statutory Duties After Receiving Respondent's December 3, 2001, Charge Does Not Transform That Charge Into Something Else

Because respondent's December 3, 2001, submission constitutes "a charge alleging unlawful discrimination," the EEOC was obligated by the ADEA "promptly" to notify petitioner and seek to eliminate its allegedly unlawful conduct "by informal methods of conciliation, conference, and persuasion." 29 U.S.C. 626(d). It is undisputed that the EEOC's Tampa field office did neither, and thus failed to fulfill the Commission's statutory responsibilities. As the EEOC's Director of the Office of Field Programs and its General Counsel stated in their August 13, 2007, Memorandum: "That situation should not have occurred." App., *infra*, 7a.

But the EEOC's failure (even when unexcused) to meet its statutory responsibilities does not bar a plaintiff's suit. The statutory text makes a plaintiff's ability to bring suit contingent on her own compliance with various timing rules, and not on the EEOC's compliance with its own statutory duties. See, *e.g.*, 29 U.S.C. 626(d) (providing that "[n]o civil action may be commenced by an individual" absent the filing of a timely charge). The lower courts broadly agree that it is inappropriate "to condition an action for discrimination on the EEOC's performance of its duties." *Wilkerson*, 270 F.3d at 1320.[14]

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[14] See *Forehand* v. *Florida State Hosp.*, 89 F.3d 1562, 1570-1571 (11th Cir. 1996) (failure to certify in early right-to-sue letter that Commission could not process charge within 180 days); *Watson* v. *Gulf & W. Indus.*, 650 F.2d 990, 993-994 (9th Cir. 1981) (failure to name one of proposed defendants in right-to-sue letter); *Russell* v. *American Tobacco Co.*, 528 F.2d 357, 365 (4th Cir. 1975)

And courts have reached the same conclusion in analogous contexts where the initiation of a private suit entails participation of government officials, such as where a United States marshal who has been designated to do so under Federal Rule of Civil Procedure 4(c)(2) fails to make proper service of a *pro se* plaintiff's complaint,[15] or where a court clerk erroneously refuses to accept a complaint for filing within the relevant limitations period.[16]

Basing the determination whether a submission is a charge, or not, on whether the EEOC fulfills its statutory duties also would create the anomalous result that a document filed by one person alleging unlawful discrimination could constitute a charge (when the EEOC fulfills its statutory duties), but the identical document filed by a different party would not constitute a charge (because the EEOC failed to fulfill those duties). There is no evidence that Congress intended to establish a regime that would generate such haphazard results and place the fate of otherwise appropriate charges of unlawful discrimination in the hands of the particular agency employees who happen to receive them.

In addition, any conclusion that the ADEA requires elimination of a private plaintiff's right to sue as a remedy for errors committed by the EEOC would raise questions under *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422 (1982). In *Logan*, this Court unanimously concluded that the Illinois

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(failure to serve notice of Title VII charge), cert. denied, 425 U.S. 935 (1976); *Thornton* v. *East Tex. Motor Freight*, 497 F.2d 416, 424 (6th Cir. 1974) (same).

[15] See, *e.g.*, *Sellers* v. *United States*, 902 F.2d 598, 602 (7th Cir. 1990); *Fowler* v. *Jones*, 899 F.2d 1088, 1095 (11th Cir. 1990); *Rochon* v. *Dawson*, 828 F.2d 1107, 1109-1110 (5th Cir. 1987); *Romandette* v. *Weetabix Co.*, 807 F.2d 309, 311 (2d Cir. 1986).

[16] See, *e.g.*, *McDowell* v. *Delaware State Police*, 88 F.3d 188, 191 (3d Cir. 1996); *Lyons* v. *Goodson*, 787 F.2d 411, 412 (8th Cir. 1986) (per curiam); *Loya* v. *Desert Sands Unified Sch. Dist.*, 721 F.2d 279, 281 (9th Cir. 1983).

courts had acted unconstitutionally in dismissing an employee's properly filed charge of disability discrimination because a state commission had failed to comply with its duty to convene a factfinding conference within 120 days. As the Court explained, although a State may certainly condition the right to sue on a *complainant's* compliance with reasonable rules, the state system at issue impermissibly "destroy[ed] a complainant's property interest, by operation of law, whenever the [state commission] fails to convene a timely conference." *Id.* at 436. That was true, the Court held, regardless of whether the commission's action was the result of "negligence, maliciousness, or otherwise." *Ibid.*

Justice Powell likewise observed that the state's scheme was "arbitrary and irrational." *Logan*, 455 U.S. at 444 (concurring in the judgment; joined by Rehnquist, J.). As he explained, "[u]nder this classification, claimants with identical claims, despite equal diligence in presenting them, would be treated differently, depending on whether the Commission itself neglected to convene a hearing within the prescribed time." *Id.* at 443. Since "claimants possessed no power to convene hearings," Justice Powell found it "unfair and irrational to punish [claimants] for the Commission's failure to do so." *Id.* at 444. As noted, the position advanced by petitioner in this case—which similarly ties the validity of a charge to agency action wholly outside a claimant's control—leads to the same type of "arbitrary and irrational" results.

Although the EEOC's failure to fulfill its statutory duties does not bar a plaintiff's suit, a district court may take steps to minimize any prejudice to the defendant in such situations. First, because the defendant was entitled to "prompt[] notice" of the charge, whereas the plaintiff was barred from filing suit for at least 60 days after it was filed, see 29 U.S.C. 626(d), the defendant may seek a stay of the action, including any discovery, for a period not to exceed 60 days to provide an opportu-

nity for conciliation. Second, in the event that a plaintiff who has filed a timely charge nonetheless delays unreasonably in filing suit—certainly if the plaintiff waits "five, ten or twenty years or more after the claims arose" (Pet. Br. 19)—a district court may consider whether dismissal is appropriate under the doctrine of laches or the like.[17]

Finally, where litigation proceeds, the district court should be sensitive to the risk that the defendant's failure to receive timely notice could prejudice its ability to defend itself. For example, the district court should refuse to give any adverse inference instruction—or to permit the plaintiff to ask the jury to draw such an inference—based on the defendant's routine and otherwise lawful destruction of documents or other evidence during the period during which it should have, but had not in fact, been on notice of the plaintiff's alle-

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[17] As for the possibility of having to defend against stale claims (Pet. Br. 18-21), no private action may be brought unless the plaintiff has filed an EEOC charge within the "quite short deadlines" imposed by the statutes that the Commission is charged with enforcing. *Ledbetter* v. *Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162, 2170 (2007) (quoting *Mohasco Corp.* v. *Silver*, 447 U.S. 807, 825 (1980)). Once a charge has been filed, the only statutory time limits applicable to a private ADEA action are that suit may be filed no less than 60 days after the charge, 29 U.S.C 626(d), and no more than 90 days after the Commission gives notice that it has terminated its own proceedings, 29 U.S.C. 626(e). That regime, however, is the result of deliberate congressional choice. See Civil Rights Act of 1991, Pub. L. No. 102-166, § 115(3), 105 Stat. 1079 (repealing prior cross-reference to the Portal-to-Portal Act, 29 U.S.C. 251 *et seq.*, that had established a limitations period of either two or three years from accrual of a plaintiff's cause of action, depending on whether the conduct was "willful"). If Congress believes that additional time limits are warranted, it is of course free to impose them. In addition, petitioner provides no explanation for why ADEA-protected individuals—persons who, by definition, tend to be older workers—who have made a timely assertion of their rights by filing EEOC charges are likely to then wait years before filing suit and seeking relief in court, and it cites no evidence that this is a serious concern in the circuits that have rejected its position.

gations. In addition, the defendant should be permitted to argue that, had it received timely notification, it would have taken steps to preserve exculpatory evidence.

But when, as here, the EEOC regrettably fails to fulfill its statutory obligations upon receiving a timely charge of unlawful discrimination, nothing in the ADEA, the EEOC's regulations, or common sense entitles defendants to a windfall in the form of the dismissal of a potentially meritorious action for unlawful discrimination under the ADEA.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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SEPTEMBER 2007

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* The Solicitor General is recused from this case.

APPENDIX

1. 18 U.S.C. 626(d) provides:

Recordkeeping, investigation, and enforcement

* * * * *

(d) Filing of charge with Commission; timeliness; conciliation, conference, and persuasion

No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission. Such a charge shall be filed—

(1) within 180 days after the alleged unlawful practice occurred; or

(2) in a case to which section 633(b) of this title applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

Upon receiving such a charge, the Commission shall promptly notify all persons named in such charge as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

* * * * *

2. 29 C.F.R. 1626.3 provides:

Other definitions

For purposes of this part, the term * * * charge shall mean a statement filed with the Commission by or on behalf of an aggrieved person which alleges that the named prospec-

tive defendant has engaged in or is about to engage in actions in violation of the Act * * *.

3. 29 C.F.R. 1626.6 provides:

Form of charge

A charge shall be in writing and shall name the prospective respondent and shall generally allege the discriminatory act(s). Charges received in person or by telephone shall be reduced to writing.

4. 29 C.F.R. 1626.8 provides:

Contents of charge; amendment of charge

(a) In addition to the requirements of § 1626.6, each charge should contain the following:

(1) The full name, address and telephone number of the person making the charge;

(2) The full name and address of the person against whom the charge is made;

(3) A clear and concise statement of the facts, including pertinent dates, constituting the alleged unlawful employment practices;

(4) If known, the approximate number of employees of the prospective defendant employer or members of the prospective defendant labor organization.

(5) A statement disclosing whether proceedings involving the alleged unlawful employment practice have been commenced before a State agency charged with the enforcement of fair employment practice laws and, if so, the date of such commencement and the name of the agency.

(b) Notwithstanding the provisions of paragraph (a) of this section, a charge is sufficient when the Commission receives from the person making the charge either a written statement or information reduced to writing by the Commission that conforms to the requirements of § 1626.6.

(c) A charge may be amended to clarify or amplify allegations made therein. Such amendments and amendments alleging additional acts which constitute unlawful employment practices related to or growing out of the subject matter of the original charge will relate back to the date the charge was first received. A charge that has been so amended shall not again be referred to the appropriate State agency.

5. The Feb. 21, 2002, Memorandum provides:

[Seal Omitted]

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, DC 20507 www.eeoc.gov

February 21, 2002

MEMORANDUM

To: All District, Area, and Local Office Directors
Washington Field Office Director

FROM : Elizabeth M. Thornton, Director /s/
Office of Field Programs

SUBJECT : **NOTIFYING RESPONDENTS OF RECEIPT OF MAIL CHARGES**

In helping the Solicitor General's Office prepare for a Supreme Court argument, we learned that some field offices may not be consistently giving timely notice of charges received by mail. This memorandum re-emphasizes the importance of giving notice within 10 days of receipt of a document that clearly constitutes a charge, even if we do not send a copy of the document itself.

In the case that was heard, the charging party, who lived some distance from our field office, sent us a charge letter 160 days after the date of alleged discrimination. His multi-page letter set out specific allegations, stated that it was a charge of discrimination, and asked us to investigate. Our office treated the letter as a charge and began its intake process,

but overlooked notifying the employer until after receiving a signed verified charge form on the 313th day.

The office's failure to send a timely notice was a mistake. When correspondence contains all the information necessary to begin investigating, constitutes a clear and timely request for EEOC to act, and does not express concerns about confidentiality or retaliation, we should docket it as a charge; acknowledge it by Letter 2-B; and serve a copy on the respondent by Form 131. EEOC Compl. Man., Vol. 1, §§ 2.2(b) and 2.7.

Please also remember that the respondent may be notified without a copy of a charge when staff determines that sending a copy of the charge "would impede the law enforcement functions of the Commission." 29 C.F.R. § 1601.14(a). Section 3.6 of Vol. I lists situations that justify not sending a copy of the initial charge document along with Form 131. However, just to be clear, if the charge document is not sent, Form 131 must still be sent (complete the "Circumstances" block with all the relevant bases, issues, and, if the alleged matters took place at location(s) other than where the form is addressed, all the relevant location(s).)

In short, Title VII, the ADA and EEOC policy require that when you receive charge correspondence meeting the requirements of Compliance Manual § 2.2(b), it should be docketed and the respondent must be notified within 10 days - either by Form 131 with a copy of the correspondence or by Form 131 alone. Please ensure that this reminder is sent to all staff.

cc: Jacqueline R. Bradley, Director FMP.
Nicholas M. Inzeo, Acting Deputy General Counsel

6. The Aug. 13, 2007, Memorandum provides:

[Seal Omitted]

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, DC 20507

August 13, 2007

MEMORANDUM

TO: All District, Field, Area, and Local Office Directors

FROM NICHOLAS M. INZEO, Director
/s/ NICHOLAS M. INZEO
Office of Field Programs

RONALD S. COOPER
/s/ RONALD S. COOPER
General Counsel

SUBJECT Timely Notification to Respondents of Receipt of Intake Questionnaires or other Correspondence Constituting Charges

The Supreme Court will be considering a case raising the issue of whether a minimally sufficient intake questionnaire that manifested the complainant's intent to file a charge constitutes a charge for timeliness purposes, even though the EEOC failed to docket it and notify the employer. *See Federal Express Corp. v. Holowecki*, No. 06-1322 (U.S.). Although the Court of Appeals found the questionnaire to be a charge, the district court in this case, as well as another circuit court, held that in these circumstances a questionnaire does not constitute a charge, resulting in the loss of the plaintiff's suit rights.

Our field office neglected to send a timely notice of the intake questionnaire. That situation should not have occurred, and this guidance is intended to insure that timely notice of charges is sent. An intake questionnaire or other correspondence can constitute a charge under the statutes we enforce if it contains all the information required by EEOC regulations governing the contents of a charge and constitutes a clear request for the agency to act. EEOC Compl. Man., Vol. I, §§ 2.2(b) and 2.7.

Under the statutes EEOC enforces, we are required to provide notification to the respondent once we receive a charge. Title VII and the ADA provide for EEOC to notify respondents within 10 days of receiving a charge. The ADEA similarly provides for EEOC to provide "prompt[]" notice of a charge. Accordingly, if it appears that a perfected charge cannot be docketed and served within ten days of receipt of a correspondence meeting the minimal requirements of a charge, be it a letter or intake questionnaire, staff must take steps to promptly ascertain whether the submitter intended to initiate proceedings and, if so, docket the questionnaire or other correspondence as a charge and serve notice on the respondent with ten days of receipt. Intent can be inferred from a plain reading of the correspondence or determined by contacting the author/submitter. Staff should send respondent notice by mailing a Form 131 accompanied by the charge or by mailing only Form 131 (in situations where sending the charge "would impede the law enforcement function of the Commission)."

These instructions should be sent to all Enforcement and Legal Staff.